

2012 WL 760548 (La.App. 3 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Third Circuit.

INTERDICTION OF THEODULE PIERRE NOEL, Sr, Defendant / Appellee / 2nd Appellant.

No. 2012 0006-CA.

March 5, 2012.

Civil Proceeding

Appealing a Summary Judgment Entered By the 15th Judicial District Court, Parish of Vermilion
The Honorable Kristian Earles, Presiding Trial Judge
No. 93963-Division “J”

Reply Brief of Petitioners / 1st Appellants

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***1 LAW AND ARGUMENT**

The old adage that a “good offense is the best defense” best describes the response on behalf of Mr. Noel. The brief is dedicated to a scathing attack of the affidavits submitted by the plaintiffs, which the trial court never considered, and has no real answer that justifies the trial court granting summary judgment without allowing any plaintiff’s right to discovery. The motion to strike the affidavits was filed within a few days of the hearing on the summary judgment, it was not noticed for hearing, it was not served on the plaintiffs, it was not argued and is not part of the final judgment that is the subject of this appeal. The trial court should have, but never considered the plaintiffs’ affidavits or looked beyond the affidavits submitted on behalf of Mr. Noel before it dismissed the petition.

The fact remains that Mr. Noel is under the undue influence of his self-dealing son and he is suffering from infirmities that make him incapable of making reasoned decisions on a sustained basis. Mr. Noel is not a “lunatic” or “running through the streets naked.” That is language chosen by his counsel and is not the burden of proof. Samuel has isolated his parents from

his siblings and controls all of the information on their parents, including medical, **financial** and personal. All plaintiffs know is what they can observe and what is filed in the public records and they should not be penalized because they do not control or possess enough information to prevail without conducting any discovery. What is apparent, is a pattern by Samuel using a suspect power of attorney to isolate, control and self-deal, and Mr. Noel being persuaded to join in lock-step, to systematically sell, alienate and encumber assets.

The Code of Procedure contemplates adequate discovery before a summary judgment is considered and the trial court erred by failing to grant the continuance and to allow for adequate discovery.

***2 SUMMARY JUDGMENT WAS CONSIDERED PREMATURELY**

The plaintiffs have not embarked on a fishing expedition by asking for discovery before the decision on the interdiction, or limited interdiction, is considered. Plaintiffs are the adult children of Mr. Noel that were designated by him in a medical power of attorney drafted by Mr. Noel's current counsel to serve as his curators if he ever needs that level of intervention. They are not strangers to Mr. Noel. They are his adult children who have personal knowledge of his condition and who stand to gain nothing by successfully interdicting Mr. Noel except for the court's supervision over their father's **financial** affairs, person, or both. Mr. Noel could live for years and require every penny of assets to provide for his care and enjoyment, which is exactly what the plaintiffs desire.

What the plaintiffs are trying to prevent is Mr. Noel divesting himself of the resources he may need to provide that level of care and enjoyment to which he is entitled because he is unable to make reasoned decisions and instead relies upon the influence of their self-dealing brother. Mr. Noel's brief discusses the fundamental right of due process being denied to Mr. Noel by allowing the plaintiffs to conduct discovery. This reasoning distorts the entire discovery process and was recently addressed in *Johnson v. Littleton*, 45,323 (La.App. 2 Cir. 5/19/10) 37 So.3d 542,548 (2010), wherein the court stated:

The only requirement is that the parties be given a fair opportunity to present their claims and, unless a plaintiff shows probable injustice, a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of material fact. *Brooks v. Minnieweather*, 44,624 (La.App.2d Cir.08/19/09), 16 So.3d 1244; *Humphries v. Cooper Truck Center*, 40,586 (La.App.2d Cir.03/08/06), 923 So.2d 940. Emphasis supplied.

The focus is the injustice of the *plaintiff*, not the defendant. It is the plaintiffs that were denied discovery, not Mr. Noel. It is Samuel who controls the information needed to make an informed decision on the need for an interdiction, either limited, ***3** full or not at all. Fundamental due process does not allow Mr. Noel to shield the plaintiffs from any discovery, then in turn use their lack of evidence as a sword to defeat their action. Both parties should be given a fair opportunity to present their claim before summary judgment is considered. *Johnson, supra*. And, the brief for Mr. Noel has no answer on that issue.

Great weight is placed on the affidavits of Mr. Noel's "treating physicians" with the conclusion that their records would not contain evidence which would be contrary to their affidavits, therefore, he would unfairly have to undergo independent testing. Br. P 9. First, not a single affidavit was submitted by a mental health professional. Second, Dr. Romero is a gynecologist. Is anyone to believe that Mr. Noel is being treated by a gynecologist? What this demonstrates is that each of these physicians has a personal relationship with either Mr. Noel or Samuel and what care they have provided or what their examination consisted of, is unknown. Third, Dr. Sheffler bought the Noel's waterfront camp. Thus, evidence of the need for an independent evaluation, which the trial court could order and control, because there is no telling what those charts may, or may not, reveal.

The plaintiffs are also criticized because they provided no medical evidence to support their argument. Br. P. 10. As everyone knows, patient privacy and HIPAA regulations prevent anyone from disclosing medical information, which is why litigants conduct discovery. Fundamental due process provides both sides a fair opportunity to present their claim and Samuel and

counsel should not be allowed to deny access to medical evidence and then use the lack of medical evidence as a reason to deny interdiction. Samuel and counsel control access to medical information and have opposed any effort to secure information from medical providers and should not be allowed to use that against plaintiffs.

***4** It is agreed that Mr. Noel can spend his money in any fashion that he wishes. His actions should be tempered, however, for his own protection, to decisions that he makes, and not decisions made by Samuel for his own interest. Since all requests for information to validate his actions, and the trial court refusing to allow discovery, this court should give plaintiffs the opportunity to conduct at least some discovery to determine if interdiction is warranted.

It is also argued that the discovery issue is not contained in the appeal record which is simply incorrect. The motion to continue was filed with the clerk of court, it is contained in the suit record, Tr. 46, and it was addressed by the trial court and made part of the judgment being appealed.

The trial court abused its discretion in failing to grant the continuance and to allow discovery before the summary judgment was considered.

MATERIAL QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT

The affidavits submitted by Mr. Noel's son and daughter are criticized as being based exclusively upon emotional beliefs and considerations. What else would be expected from his children? Clearly this is an emotional issue, for both sides of this divided family. And, instead of resolving family matters in a private, non-litigious manner, it has become a public battle where every action attempted by his children, and everything they say, is distorted, taken out of context and unnecessarily challenged.

Three of the four of Mr. Noel's adult children - none of whom are self-dealing -are asking the court to allow them to conduct discovery to determine if Mr. Noel is able to consistently make reasoned decisions. From what the plaintiffs can observe, he cannot. They are certainly passionate about their knowledge and based upon what they know, as set forth in their affidavits, they have determined that their self-dealing ***5** brother is interfering with Mr. Noel's ability to make reasoned decisions. He has isolated Mr. Noel from them and has threatened violence and restraining orders if they come around. They know what happens when they visit their father's home. They know their family history. They know their father's medical history. They know what care they provided to their parents before 2006. They know that after their mother's health failed in 2005, their brother isolated them from their parents and he and their father began systematically and routinely "selling" Samuel and his wife their parents land, with legal documents prepared by his current counsel, and they have no way to determine if the funds are actually exchanging hands. For example, the camp at Cypremort Point was sold to Dr. Sheffler. Did the sale proceeds go to Samuel's bank account or their parents? They know that Mr. Noel says that he needed cash for medical care, yet, they also know he had substantial money in the bank. Who better than plaintiffs to provide the court with insight on these critical issues, except possibly Mr. Noel?

Yet, Mr. Noel has remained silent and offers no explanation why he has not spoken up for himself. [La. Code of Civil Proc. Art. 4547](#) prohibits a court from conducting a hearing on an interdiction in the absence of the proposed interdict, without good cause, and yet, no court has heard anything from Mr. Noel. Instead, the trial court relied upon an affidavit from his gynecologist, sheriff and tenant farmer. Or possibly his self-dealing son and his wife who are profiting from supposed land sales. Again, silence. Even in the face of allegations about the timing of the power of attorney that Mr Noel's counsel prepared for Samuel and if it was granted at a time when Mr. & Mrs. Noel had the capacity to grant that authority, there is no response.

Are three of the four Noel children, who are designated by him in a power of attorney to serve as custodians, supposed to sit back while their brother convinces ***6** their father to divest himself of all of his assets? It is admitted that Mr. Noel can do whatever he wants with his person or estate, so long as it is him making reasoned decisions about what happens and he comprehends the nature and consequence of his actions.

Counsel is trying to convince this court that the plaintiffs are actually concerned with preserving their expected inheritance and not concerned with the welfare of their father. Query how that occurs? Assuming that Mr. Noel was to be interdicted, what would stop the curator from maintaining Mr. Noel in his current standard of living? Would he or she not pay his medical expenses or provide a comfortable vehicle for his transportation or even liquidate every asset he has to provide for his care? The answer is: nothing. Mr. Noel could be interdicted and they could still inherit nothing. That argument is without merit.

Without any discovery it is impossible to evaluate the facts of Mr. Noel's situation. The extent and scope of decisions that may or may not be reasoned, may somewhat be speculation, however, the affidavits submitted by plaintiffs do contain facts based upon personal knowledge and do raise questions of fact that should preclude summary judgment. These witnesses know the circumstance that their father is in and understand the influence being asserted by Samuel. As Ted, Jr. succinctly stated:

Knowing the totality of the facts about my father's professional and family history, business transactions, lifestyle choices, habits and routines, he is NOT capable of administering his **financial** affairs and personal affairs.

Catherine works in the medical field and has an understanding of what is occurring and how her brother has been able to manipulate the situation to his advantage. Again, knowing the entirety of the situation another competent adult child concludes:

*7 My father may be able to do certain cognitive actions, but it is apparent that he cannot engage in the thinking that is required to manage his person and his estate.

The affidavits by the doctors were fill-in-the-blank statements that provide no foundation, no mental health professional, no scope of examination, no testing, etc.

There are questions of fact that preclude summary judgment of this matter. At the least, discovery should have been permitted.

MOTION TO STRIKE

The response leads with a discussion about the affidavits submitted by Ted and Catherine. Procedurally, as mentioned above, the court never considered the affidavits, it never considered the motion to strike, the motion to strike was not served, it was not set for hearing, it was not argued and it is not addressed in the judgment from the appeals arise.

[La. Code Civ. Proc. Ann. art. 2082](#) provides:

Appeal is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court.

In the case at hand, the trial court has not rendered a decision or judgment on the motion to strike from which Mr. Noel can appeal.

If the trial court has not yet acted on the matter, there can be no appeal to which the jurisdiction of the appellate court can attach. See [La. Code Civ. Proc. Ann. arts. 2082, 2083](#).

Ann. art. 2163.La. Prac. Civ. App. § 5:4 (2011 ed.)

[Louisiana Code of Civil Procedure article 2164](#), further provides that this court is limited to ruling upon what is in the record.

*8 Appellate courts are courts of record, [which] must render judgment based on the record on appeal.

[La.Code Civ.P. art. 2164](#). We may not review evidence that is not in the record, and we may not receive new

evidence. Moreover, we may not even consider exhibits filed in the record if those exhibits were not also filed into evidence, unless we are otherwise authorized by law to do so (as in summary judgment procedure).

Sutton's Steel & Supply, Inc. v. Bellsouth Mobility, Inc., 00-511,00-898, p.4 (La.App. 3 Cir. 12/13/00), 776 So.2d 589, 592, writ denied, 01-0152 (La.3/16/01), 787 So.2d 316 (case citations omitted).

There is nothing in the record of this matter for this court to consider relative to the motion to strike as it was not considered at the trial level, and there is no judgment entered that either grants or denies the relief. Accordingly, this court should not consider the motion to strike raised by Mr. Noel.

If this court does consider the motion to strike the affidavits of Ted and Catherine, they are based upon what they saw, heard and perceived with their own senses. Mr. Noel relies upon a letter from plaintiffs' counsel, agreeing with Mr. Noel's counsel's suggestion, to try and demonstrate that this petition is about preserving inheritance and not about the care of Mr. Noel. That excerpt is taken completely out of context and is being manipulated to try and distort the truth. The underlying truth is that letter was written after a meeting with Mr. Noel's estate planning counsel wherein a gifting plan was discussed in contrast to Mr. Noel's offer to sell plaintiff's land. The letter does not prove any "vested right theory" as advanced by Mr. Noel.

The affidavits do have specific factual statements about bizarre behavior on the part of Mr. Noel. As stated in Respondent's brief, the specific facts of a circumstance should be considered. What is bizarre for Mr. Noel may not be bizarre of another person, but it does not mean that discovery on interdiction should be denied.

***9** It is acknowledged that this has been a family in conflict since 2006 and Respondents liken it to the Jerry Springer Show because Mr. Noel is hurt, angry and frustrated with the plaintiffs based upon "their behavior." The situation should not be trivialized by analogy to reality television, but it is Samuel who has created the sensation.

A review of the affidavits of Ted and Catherine reveals what has occurred in this family since 2006. Prior to 2006, this was a united family that pulled together and functioned as a family unit. Since their mother's stroke in 2005 and her lack of family guidance, their father and mother have been isolated by Samuel from the remaining family and he has protected that isolation, even with the threat of violence.

Mr. Noel is an **elderly** gentleman who had a major stroke in 2002, and enjoyed the love and care of his wife and all of his children and grandchildren until 2005. In the summer of 2005, Mr. Noel granted a medical power of attorney that gave all four of his children participation in his care. Then, at the end of 2005, coinciding with Mrs. Noel's loss of control of her faculties, Samuel convinced Mr. Noel that three of his children and seven of his grandchildren hated him and began a scheme of isolation and control. Then, the public records reveal the self dealing documents, authored by Mr. Noel's current counsel, that start divesting him and his wife of assets. Query: does this radical departure of behavior alone not justify at least some reasonable inquiry into Mr. Noel's capacity? The necessary allegations are set forth in the petition and there are questions of fact that preclude summary judgement.

***10 REQUEST FOR FEES AND SANCTIONS**

The appeal record is also void of any motion, evidence or judgment on the trial court's decision to deny the motion to tax petitioners with attorney's fees. There is nothing in record on that motion, and this court should not consider that part of respondent's appeal as well.

If this court does consider that part of the appeal, the trial court was proper in denying the motion and it should be affirmed.

CONCLUSION

It was too soon to consider summary judgment in this matter. The Code of Procedure allows for early summary judgment, but reasonable discovery must be permitted first to insure that the process is fair to all parties. There are questions of fact that need to be explored which preclude summary judgment.

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